IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	No. 37727-6-II
Respondent,	)	
v.	)	
MIGUEL MARTINE DIAZ ELROD,	)	UNPUBLISHED OPINION
Appellant.	)	

Kulik, J. — Miguel Martine Diaz Elrod[1] pleaded guilty to second degree murder for the death of an alleged rival gang member. At the sentencing hearing, Diaz Elrod's appointed counsel attempted to withdraw as counsel. The trial court denied counsel's request and proceeded to sentencing. Diaz Elrod appeals his conviction, arguing that the trial court erred by denying his counsel's motion to withdraw. Although Diaz Elrod asserts he moved to withdraw his guilty plea, the record does not support his assertion.

We conclude the trial court did not abuse its discretion by denying withdrawal of counsel and proceeding with sentencing. Therefore, we affirm the conviction for second degree murder.

[1] In the record, we note different spellings for Diaz Elrod's last name. For the purposes of this opinion, we will use the spelling which appears on the information.

FACTS

On December 7, 2006, the State charged Miguel Martine Diaz Elrod with first degree murder in connection with the shooting death of Saron Tith on May 23, 2004. The information alleged that Diaz Elrod was armed with a firearm at the time he committed the murder. The information also alleged, as an aggravating factor, that Diaz Elrod committed the offense to obtain or maintain his membership or advance his position in the hierarchy of an organization, association, or identifiable group. Diaz Elrod was also charged with an unrelated murder, filed separately under Pierce County No. 06-1-05762-9.

On March 4, 2008, after two to three days of resolving the motions in limine, the parties began jury selection. The parties also continued to engage in plea negotiations, and reached a plea agreement.

Under the plea agreement, the State agreed to file a second amended information, reducing the charge against Diaz Elrod to second degree murder, with no firearm enhancement and no aggravating factor. The State also agreed to dismiss the second murder charge pending against Diaz Elrod under Pierce County No. 06-1-05762-9. Additionally, the parties agreed to jointly recommend a high-end standard range sentence of 265 months, plus standard fines and costs, and 24 to 48 months' community custody.

Defense counsel advised the trial court that he had reviewed each paragraph of the statement of defendant on plea of guilty with Diaz Elrod. Counsel further stated that he had read each paragraph of the document to Diaz Elrod, while Diaz Elrod read the document to himself. After they read each paragraph, Diaz Elrod initialed that paragraph. Counsel proceeded to outline the agreement at length with the trial court and stated that Diaz Elrod understood each of the provisions. The trial court verified that Diaz Elrod could read and write the English language and carefully reviewed Diaz Elrod's constitutional rights with him, including the rights he would be giving up by pleading guilty. In addition, the court advised Diaz Elrod of the charges against him and the elements of second degree murder. The court also reviewed Diaz Elrod's offender score, the standard sentencing range, the community custody range, and the maximum penalty it could impose if Diaz Elrod pleaded guilty. It again summarized the terms that the prosecutor would be recommending and other consequences of entering the plea.

The court then asked Diaz Elrod if he was making his plea freely and voluntarily. Diaz Elrod advised the court he understood the plea he was entering and the consequences of that plea, he acknowledged that no one had made any threats or promises to him to get him to enter the plea, and he assured the court he wanted to proceed with the plea. Diaz Elrod then pleaded guilty to second degree murder. Based on the affidavit of

probable cause, the court found that there was a factual basis for the plea. The court accepted the plea, finding that it was freely and voluntarily made.

The State complied with the terms of the plea agreement. The State filed the second amended information, charging Diaz Elrod with second degree murder and dropping the aggravating factor and sentencing enhancement. The State also dismissed the second murder charge under Pierce County No. 06-1-05762-9.

After accepting Diaz Elrod's guilty plea, the court initially scheduled the sentencing hearing for April 25. The sentencing hearing was later continued to May 2. Defense counsel immediately informed the court of a problem, stating the he was not prepared to proceed with sentencing. He went on to tell the court:

> [Defense Counsel]: . . . Mr. Diaz-Elrod has asked me to withdraw as his counsel and have the Department of Assigned Counsel [DAC] appoint him new counsel, to explore withdrawing his guilty plea in this matter. Mr. Diaz-Elrod requested that almost immediately after he entered the plea.
>
> . . . Mr. Diaz-Elrod, last week, stated that he would go forward with the sentencing, and then this week, he's been adamant that he would like to withdraw his plea.
>
> Based upon his assertions to me as to why he wants to withdraw the plea, I believe it would be prudent for me to withdraw, based upon his statements to me about the basis for the withdrawal, and that DAC appoint Mr. Diaz-Elrod other counsel.
>
> I've asked Mike Kawamura, Director of Department of Assigned Counsel, to attend today, so that if the Court accepts that, that the Department can be on notice that they need to have someone meet with Mr. Diaz-Elrod immediately, so that that issue can be addressed.

Report of Proceedings (May 2, 2008) (RP) at 4.

The State indicated that it was unaware of the situation and argued that Diaz Elrod had not provided a basis or sufficient information for the court to grant a continuance. The State also pointed out that it had already dismissed the second murder charge in exchange for the guilty plea. The State argued: "If there is some legitimate basis, at least the Court needs to be apprised of the nature of the problem." RP at 5. And, after noting that the court went through a thorough colloquy with Diaz Elrod before accepting the plea, the prosecutor stated: "There should be some finality, unless there is a legitimate reason to either investigate or withdraw a plea. There's nothing before this Court that says the Court should grant the motion." RP at 6.

At that point, the court asked Kawamura if he had anything to state for the record with regard to the issue of Diaz Elrod's representation. Kawamura stated that he had no knowledge of the specific reasons for the request. He went on to tell the court:

> In any event, if the Court were to hold over sentencing and grant the defendant's request and order assigned counsel to provide alternative counsel for what's being sought, I certainly would do that if the Court directs me, but I really can't articulate to the Court the basis for this. I don't have personal knowledge of that.

RP at 6-7.

The court denied the motion and proceeded with sentencing. The court explained its reasoning, as follows:

> This Court, I believe, when a motion of this type is made at this juncture of the case, and having already continued the sentencing once, I believe I have the discretion in order to proceed with the sentencing.
>
> This, in no way, limits Mr. [Diaz] Elrod from retaining counsel or being—having new counsel assigned to this case after the sentencing, and bringing forth the motion to set aside the plea of guilty, but I do not believe it would be in the interest of justice, nor do I believe there would be any prejudice to the defendant, to having counsel proceed and be attorney of record through this sentencing, based on his history of this case. And I believe he can more than adequately represent the interest of this defendant.
>
> And again, I'm not ruling or making any—attempting to make any rulings on the issue of him having an opportunity to bring a motion [to set aside the plea];[2] I think that's his absolute right. And if new counsel's required because of a conflict of interest that's developed, then that could be a matter for another hearing. But for now, because of the lateness of this motion, and the fact that we are—have continued this once, already, and that all parties are present, I believe, in the interest of justice, that we should proceed with sentencing.
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> . . . .
>
> So that will be the ruling of the Court.

RP at 7-8.

The court followed the joint sentencing recommendation and sentenced Diaz Elrod to 265 months' confinement, 24 to 48 months' community custody, and imposed standard costs and fines, and entered the judgment and sentence. This appeal followed.

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[2] The trial court incorrectly used the language "motion for setting aside the verdict," but shortly afterward corrected the statement to say motion to withdraw his plea. RP at 7-8.

ANALYSIS

On appeal, Diaz Elrod argues that the trial court erred by denying his motions to withdraw his guilty plea and for new counsel without hearing the merits of the motions or permitting Diaz Elrod to explain his reasons for making the motions. In response, the State contends that the only motion defense counsel made at the sentencing hearing was a motion to allow him to withdraw as counsel. The State further argues that the trial court properly denied the motion to withdraw because it was untimely and because Diaz Elrod was unable to show good cause to support his motion.

As a threshold matter, we must determine whether Diaz Elrod, in fact, made a motion to withdraw his guilty plea before sentencing, as he now claims. We note that review of this issue was made more difficult because the parties failed to expressly identify the motion being made. After a careful review of the record, we are satisfied that the single motion raised by Diaz Elrod's defense counsel at the sentencing hearing was a motion for withdrawal and substitution of counsel.

Defense counsel advised the trial court that Diaz Elrod "has asked me to withdraw as his counsel and have the Department of Assigned Counsel appoint him new counsel, to *explore* withdrawing his guilty plea in this matter." RP at 4 (emphasis added). He then indicated that Diaz Elrod had wavered on the issue of withdrawing his plea and, as recently as the week prior, had told counsel that he wanted to go forward with sentencing.

Therefore, although defense counsel raised the issue of withdrawal of the guilty plea, he did not specifically move to withdraw the plea; he moved only to withdraw as counsel.

The conclusion that defense counsel made only a single motion to withdraw is further supported by the prosecutor's and Kawamura's responses. The prosecutor, in opposing the request, characterized it as a motion for substitution of counsel or, in the alternative, as a motion for a continuance. He nonetheless referred to it as a single motion. Likewise, Kawamura's remarks show that he viewed the request as a motion for substitution of counsel.

The trial court's ruling is the most instructive. The record shows that the focus of the ruling was whether to have current defense counsel proceed as the attorney of record through sentencing. The court then distinguished the motion before it from a motion to withdraw a guilty plea, stating: "I'm not ruling or . . . attempting to make any rulings on the issue of him having an opportunity to bring a motion for [withdrawing the plea]." RP at 7. After ruling that sentencing would proceed with his appointed counsel, the trial court also stated that the ruling would not prevent Diaz Elrod from having new counsel assigned after sentencing.

Based on counsel's statement that the idea of withdrawing the guilty plea was only being explored, the surrounding statements, and the trial court's ruling, we conclude that Diaz Elrod did not move to withdraw his guilty plea nor did the court rule on that issue.

Accordingly, the record does not support Diaz Elrod's assertion that he made *both* a motion to withdraw his guilty plea and a motion for new counsel.

We must next determine whether the trial court erred by denying Diaz Elrod's motion for withdrawal and substitution of counsel. We review the trial court's denial of appointment of new counsel for an abuse of discretion. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

The Sixth Amendment to the United States Constitution right to counsel generally includes the right to select and be represented by counsel of the defendant's choice. *State v. Price*, 126 Wn. App. 617, 631, 109 P.3d 27 (2005) (quoting *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994)). The right to counsel of choice, however, unlike the right to counsel in general, is not absolute. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997).

"A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id.* at 734. Importantly, an attorney-client conflict may justify granting a substitution motion only when the defendant and counsel are so at odds as to prevent presentation of an adequate defense. *Id*. Whether an indigent defendant's dissatisfaction with court-appointed counsel is justified and warrants the appointment of new counsel is

a matter within the trial court's sound discretion. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991).

Factors the trial court considers in deciding a motion to withdraw and substitute appointed counsel include: (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution on the scheduled proceedings. *Stenson*, 132 Wn.2d at 734.

Examining the first factor, Diaz Elrod failed to show good cause to warrant the appointment of new counsel for sentencing. Initially, defense counsel advised the court that Diaz Elrod had asked him to withdraw as counsel and have new counsel appointed. Defense counsel suggested that a potential conflict of interest had developed and that he believed that it was "prudent" for him to withdraw. RP at 4. But, there was no suggestion that counsel had such a conflict of interest to the degree that he could not effectively represent Diaz Elrod at sentencing.

The State argued against allowing substitution of counsel because Diaz Elrod had provided no basis for the motion. The State pointed out that defense counsel had been involved with the case from the outset and remarked that the case involved "a whole lot of history over a long period of time." RP at 5. The prosecutor also commented positively on defense counsel's thoroughness and stated: "I know how demanding he is of the State, and I know what we worked out [in the plea agreement] is more than favorable,

frankly, to the defendant, and there's just no basis." RP at 5. The prosecutor advised the court that "[i]f there is some legitimate basis, at least the Court needs to be apprised of the nature of the problem." RP at 5.

The court then asked Kawamura whether he had any additional information for the court regarding Diaz Elrod's motion. Kawamura replied that he had no information regarding the specific reasons for the motion to substitute counsel. Neither Diaz Elrod nor his counsel provided further argument. Therefore, with regard to the first factor, Diaz Elrod failed to provide the trial court with a sufficient basis to support his motion to substitute counsel.

The second factor, the court's own evaluation of counsel, also supports the court's denial of the motion. The trial court commented on defense counsel's effectiveness, stating:

> I think the State has already shown great leniency, in my opinion, in reducing this down to a Murder II. And *I think counsel for the defense has accomplished something very major for his client*, in order for this to come about, because I know the philosophy of the prosecutor's office, in regards to these charges, and they're very aggressive.

RP at 21 (emphasis added). Moreover, the court ruled:

> I do not believe it would be in the interest of justice, nor do I believe there would be any prejudice to the defendant, to having counsel proceed and be

> attorney of record through this sentencing, based on his history of this case. *And I believe he can more than adequately represent the interest of this defendant*.

RP at 7 (emphasis added).

The record shows that defense counsel was familiar with the case and that he did, in fact, capably represent Diaz Elrod in negotiating the plea agreement. There is no reasonable basis to conclude that he could not adequately represent Diaz Elrod at sentencing, especially given that the parties had already agreed to a jointly-recommended sentence.

Third, the effect of substituting counsel on the scheduled proceedings also weighs in favor of the court's decision to deny the motion. "The trial court must balance the defendant's interest in counsel of his or her choice against the 'public's interest in prompt and efficient administration of justice.'" *Roth*, 75 Wn. App. at 824-25 (quoting *Linton v. Perini,* 656 F.2d 207, 209 (6th Cir. 1981)).

Here, Diaz Elrod's motion to substitute counsel was made at the May 2 sentencing hearing. The court had continued sentencing from the original April 25 sentencing date. At the May 2 sentencing hearing, members from both the victim's family and Diaz Elrod's family were present and ready to address the court. Diaz Elrod's motion to substitute counsel would have further delayed the sentencing hearing and would have impacted family members for both the victim and the defendant.

In light of the limited argument offered to support the motion, the court's own evaluation of counsel, and the effect of further delay on the scheduled proceedings, we conclude it was not an abuse of discretion for the trial court to deny Diaz Elrod's request for new counsel.

We affirm the conviction for second degree murder.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Van Deren, C.J. Houghton, J.